Commonwealth of Massachusetts
State Ethics Commission

One Ashburton Place, Room 619, Boston, MA, 02108
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SUFFOLK, ss. **COMMISSION ADJUDICATORY DOCKET NO.**

Frank Martin
c/o Michael Early, Esq.
114 Washington Street, Rear
Haverhill, MA 01832

PUBLIC ENFORCEMENT LETTER 99-4

Dear Mr. Martin:

As you know, the State Ethics Commission ("Commission") has conducted a preliminary inquiry into allegations that you violated the state conflict of interest law, G.L. c. 268A, by receiving compensation from or acting as an agent for private parties in relation to City of Lawrence Fire Department ("Fire Department") matters. Based on the staff's inquiry (discussed below), the Commission voted on November 18, 1998, that there is reasonable cause to believe that you violated the state conflict of interest law, G.L. c. 268A, §17(a) and (c). The Commission, however, does not believe that further proceedings are warranted. Instead, the Commission has determined that the public interest would be better served by bringing to your attention, and to the attention of the general public, the facts revealed by the preliminary inquiry and by explaining the application of the law to such facts, with the expectation that this advice will ensure your understanding of and future compliance with the conflict of interest law. By agreeing to this public letter as a final resolution of this matter, you do not admit to the facts and law discussed below. The Commission and you have agreed that there will be no formal action against you in this matter and that you have chosen not to exercise your right to a hearing before the Commission.

I. Facts

1. You have been a full-time Lawrence firefighter for approximately 13 years. You currently earn $50,000 per year as a firefighter.

2. Since 1993 you have done business as Martin Oil Burner Service & Underground Tank Removal, located at 15 North Boylston, Lawrence, Massachusetts. In this business you install and service oil burners and remove fuel storage tanks.

3. The Lawrence Fire Department requires permits for the removal of any tank which has been used for the storage of flammable materials. These typically involve underground tanks such as full storage tanks, as well as tanks located in buildings such as basement oil heating tanks.[1/]

4. The Fire Department conducts on-site inspections when underground tanks are removed. The Fire Department acts as an extra set of eyes for the state DEP by watching for any signs of soil contamination and insuring that the tank is empty. No inspection occurs with basement tanks. As to both underground and basement tanks, permits are held open until the property owner or contractor returns the permit with a receipt evidencing proper disposal of the

tank. As to underground removals, because of the concern regarding soil contamination, frequently, an environmental consultant is hired to observe the removal and file a report with the property owner. In the event of a determination of soil contamination, the property owner has 48 hours to notify the DEP.

5. You were paid in connection with 29 tank removals in the City of Lawrence between March 1994 and April 1997.[2/] The Fire Department issued a permit for each such removal. Of those 29 permits, 26 involved you pulling the permit from the Fire Department.[3/] Fourteen of those 29 involved underground tank removals, and the remainder involved above-ground tanks such as basement heating fuel tanks. You were paid anywhere from several hundred to several thousand dollars for each job depending on the circumstances.

6. We uncovered no evidence to suggest you used your Fire Department position to benefit your private business, or that customers chose you because of your Fire Department position.[4/]

II. Discussion

As a City of Lawrence firefighter you are a municipal employee as that term is defined in G.L. c. 268A, §1. General Laws c. 268A, §17(a) prohibits a municipal employee, otherwise than in the proper discharge of his official duties, from receiving compensation from anyone other than the city in relation to any particular matter in which the city is a party or has a direct and substantial interest. General Laws c. 268A, §17(c) prohibits a municipal employee, otherwise than in the proper discharge of his official duties, from acting as agent for a private party in connection with any particular matter in which the city is a party or has a direct and substantial interest.

Decisions to issue permits for tank removals are particular matters.[5/] The city has a direct and substantial interest in these matters because those permits involve activities which can potentially significantly affect the public health and safety. You received compensation for the tank removal work you did in relation to a permit on each of the 29 occasions described above. Furthermore, you acted as an agent for your clients in each of the 26 occasions when you pulled the permit.

By accepting payment for tank removal work, you received compensation from someone other than the City of Lawrence in relation to particular matters in which the city had a direct and substantial interest. Therefore, there is reasonable cause to believe you violated §17(a). In addition, by "pulling" permits on 26 occasions, you acted as agent for someone other than the city in relation to particular matters in which the city had a direct and substantial interest. Therefore, there is reasonable cause to believe you violated §17(c). *See, e.g., Townsend, Jr., 1986 SEC 276* (disposition agreement in which Conservation Commission member pays $1,000 fine for violating §17(a) and (c) by acting as a paid engineer on behalf of private client in relation to Conservation Commission matters.)

III. Disposition

The Commission is authorized to resolve violations of G.L. c. 268A with civil penalties of up to $2,000 for each violation. The Commission chose to resolve this case with a public enforcement letter, rather than pursuing a formal order which might have resulted in a civil penalty, because it believes there is need for further education on this issue.[6/]

Based upon its review of this matter, the Commission has determined that your receipt of this public enforcement letter should be sufficient to ensure your understanding of and future compliance with the conflict of interest law.

This matter is now closed.

DATE: April 21, 1999

[1/] General Laws c. 148, §38A prohibits any "underground tank" which has been used for the keeping or storage of flammable or combustible fluids from being removed unless a permit for such removal has first been obtained from the state fire marshal or the official designated by him to grant permits in the city where the tank is located. Section 38A goes on to provide that any violation of any regulation adopted by the Massachusetts Board of Fire Prevention Regulations with respect to a tank removal shall be presumed to constitute irreparable harm to the public health, safety, welfare and the environment. In your view, c. 148, §38A does not apply to basement tanks. Both the Department of Public Safety Underground Storage Tank Department and the Lawrence Fire Department, however, take the position that c. 148, §38A does apply to basement tanks.

[2/] March 1994 was the first month in which we found a record for such work.

[3/] As to the three instances in which you did not pull the permit, the homeowner pulled one, and a licensed site professional who hired you to remove the tanks pulled the other two.

[4/] Your Fire Department duties do not include any involvement in issuing these tank removal permits or conducting the inspections.

[5/] No municipal employee shall, otherwise than as provided by law for the proper discharge of official duties, directly or indirectly receive or request compensation from anyone other than the city or town or municipal agency in relation to any particular matter in which the same city or town is a party or has a direct and substantial interest.

[6/] Although this is the first time the Commission has brought a public enforcement action regarding "pulling" permits or work done in connection with those permits, the Commission has previously stated through its published opinions that such actions violate §17. *See, e.g., EC-COI-92-1, 88-9 and 87-31.* Moreover, it should be noted that the Legislature has apparently endorsed the Commission's position by carving out certain exemptions which allow public inspectors to do work in relation to permits issued by their own departments provided they do not inspect that work. *See, e.g., G.L. c. 166, §32A* (a wiring inspector is also an electrician may perform electric work in his own town provided that someone else inspects that work). There are similar schemes for board of health inspectors (G.L. c.111, §26(g)), building inspectors (G.L. c. 143, §3(z)), and plumbing and gas inspectors (G.L. c. 142, §12). Significantly, in 1998 the Legislature amended §17 to add language expressly allowing a municipal employee to apply on behalf of anyone for a building, electrical, wiring, plumbing, gas fitting or septic permit and to allow that person to receive compensation in relation to that permit, "Unless such an employee is employed by or provide services to the permit-granting agency or an agency that regulates the activities of the permit-granting agency." Through all of these actions the Legislature appears to have recognized that certain exemptions to §17 may be necessary to make local government workable, but unless one qualifies for such an exemption, a local public official who is also a contractor should not pull a permit or do work in relation to that permit. The most recent §17 amendment makes particularly clear that this should not happen where the public employee is employed by the permit granting agency, such as was the case in your situation. In light of the Commission's prior publications and what appears to be a legislative endorsement of its position, it now appears appropriate to begin bringing public enforcement cases as to these types of §17 violations.